

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH LOMBARDO, KAREN STOUT,	:	
and TRI-COUNTY DISPOSAL & RECYCLING,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 00-3340
EASTERN WASTE OF PHILADELPHIA, INC.,	:	
LOUIS PAOLINO, JR., and EASTERN	:	
ENVIRONMENTAL SERVICES, INC.,	:	
Defendants.	:	

**MEMORANDUM-ORDER**

**GREEN, S.J.**

**February \_\_\_\_\_, 2001**

Presently before the Court is Defendant Louis Paolino, Jr.'s Motion to Dismiss the Amended Complaint filed pursuant to Federal Rule of Civil Procedure 12(b)(6), and Plaintiffs' Answer thereto. For the following reasons, Defendant's motion will be granted.

**I. Factual and Procedural Background**

Plaintiffs were "engaged in the business of waste management collection, recycling and disposal." See Pltfs.' Amended Complaint ¶2. In May of 1996, Plaintiffs agreed to sell all of their assets and properties in Tri-County Disposal & Recycling ("Tri-County") to Eastern Waste of Philadelphia, Inc. ("Eastern"). See Pltfs.' Amended Complaint ¶ 8. As part of the Purchase and Sale of Assets Agreement ("Agreement"), Plaintiffs were given up-front consideration of \$1.2 million. See Pltfs.' Amended Complaint ¶ 8; Agreement, Article 2, § 2.1. In addition to the up-front consideration, Plaintiffs were promised additional consideration if certain events occurred. See Pltfs.' Amended Complaint ¶ 11. Plaintiffs allege that all of the prescribed events did transpire, and that, as a result, they are due significant consideration from Defendants,

which, to date, Defendants have not forwarded. See Pltfs.’ Amended Complaint ¶ 11.d.; ¶ 13. Plaintiffs argue that Defendants’ failure to remunerate the Plaintiffs in accordance with the Agreement must be viewed as a breach of contract, for which Plaintiffs are entitled damages.

Defendant Louis Paolino, Jr. (“Paolino”), argues that, since the Agreement was between Plaintiffs and Eastern, and since Paolino acted only in his capacity as a corporate officer of Eastern, Paolino cannot be liable for any alleged breach of contract. See Deft.’s Mem. at 1. Plaintiffs argue that Paolino should be responsible for personal actions Paolino took in the execution of the Agreement. See Pltfs.’ Mem. in Opposition at 4.

Plaintiffs filed the instant action in the Philadelphia Court of Common Pleas. The Defendants removed the case on June 30, 2000, invoking the diversity jurisdiction of this Court pursuant to 28 U.S.C. § 1332. Plaintiffs’ filed an Amended Complaint on August 4, 2000, alleging that the Defendants were liable for breach of contract.<sup>1</sup> Paolino now asks the Court to dismiss the action against him, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiffs have failed to state a cause upon which relief may be granted.

## **II. Discussion**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted

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<sup>1</sup> Plaintiffs Amended Complaint actually contains four distinct counts: Count I against all Defendants for Breach of Contract; Count II against all Defendants for Conversion; Count III against Defendants Eastern, Eastern Environmental Services, Inc., and Louis Paolino, Jr., for Punitive Damages; and, Count IV, which was not captioned, against Defendant Waste Management, Inc. See Pltfs.’ Amended Complaint By stipulation of the parties, Counts II and III were dismissed with prejudice. The Moving Defendant for the matter sub judice is Defendant Louis Paolino, Jr., with regards solely to his inclusion in Count I, which is the only remaining cause of action against him in the Amended Complaint.

under any set of facts which could be proved. See Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232-33 (1984). Because granting such a motion results in a determination on the merits at an early stage of a Plaintiffs' case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the [Plaintiffs], and determine whether, under any reasonable reading of the pleadings, the [Plaintiffs] may be entitled to relief." Colburn v. Upper Darby Twp., 838 F.2d 663, 664-65 (3d Cir. 1988), *cert.denied*, 489 U.S. 1065 (1989). "As a basic premise, federal courts sitting in diversity are required to apply the substantive law of the state whose laws govern the action." Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990). "When ascertaining matters of state law, the decisions of the state's highest court constitute the authoritative source." Connecticut Mutual Life Insurance Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983). "In cases where the state's highest court has not considered the precise question to be answered, the federal court is called upon to predict how the state court would resolve the issue should it be called upon to do so." Robertson, 914 F.2d at 378. Judgments from the lower courts of the state should be considered, and given "proper regard, but not conclusive effect." See Connecticut Mutual Life Insurance Co., 718 F.2d at 65.

Both parties agree that Pennsylvania law applies to this action. See Deft.'s Mem. at 1; **Pltfs.' Mem. in Opposition** at 4. Generally, in Pennsylvania, liability cannot lie against a corporate officer, director or shareholder for the corporation's breach of a contract. See Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1520-21 (3d Cir. 1994); First Realvest v. Avery Builders, 600 A.2d 601, 603 (Pa. Super. Ct. 1991). However, a corporate officer that is normally protected may be personally liable under the "participation theory" or under the equitable doctrine of "piercing the corporate veil." Under the "participation theory," a court may impose

“personal liability on the individual as an actor rather than as an owner . . . where the record establishes the individual’s participation in the tortious activity.” See, e.g., Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983). In attempting to “pierce the corporate veil,” Plaintiffs must show that the “owner [of the corporation] is liable because the corporation is not a bona fide independent entity [and] therefore its acts are truly his.” See Wicks, 470 A.2d at 89-90.

A. “Participation Theory”

The Pennsylvania Supreme Court has not explicitly stated that the “participation theory” is applicable to a claim for breach of contract. See, e.g., Wicks, 470 A.2d at 90 (applying “participation theory” to tort claim). However, even assuming that the Pennsylvania Supreme Court would allow a claim for breach of contract to proceed under the “participation theory,” the Plaintiffs have not alleged sufficient facts against the Defendant to support this theory. Plaintiffs have not alleged that the Defendant made any promises independent of the promises he made as a corporate officer of Eastern. Also, there are no allegations that Defendant took actions separate from the actions he took as a corporate officer, or that Defendant was personally responsible to pay Plaintiffs. Further, there is no allegation that Defendant promised to pay the Plaintiffs; rather, the promises of payment were made by the corporation, and not the Defendant. Finally, Plaintiffs have not alleged any facts to show that the Defendant took personal steps to breach the contract, or to thwart the goals of the contract.

Absent these independent allegations of specific promises and misconduct against Paolino directly, Plaintiffs claims cannot stand, and must be dismissed.

B. “Piercing the Corporate Veil”

Plaintiffs have not alleged any facts in their Amended Complaint which would indicate

that Defendant's corporation was a sham, or established and conducted without the formalities generally associated with corporations. Without specific allegations in the Amended Complaint, Plaintiffs' claim cannot proceed under this equitable doctrine.

### **III. Conclusion**

Plaintiffs have not alleged facts sufficient to proceed against Paolino independently. However, in the interests of justice, and consistent with Federal Rule of Civil Procedure 15(a), Plaintiffs will be given 20 days to file a Second Amended Complaint, which more precisely sets forth the conduct of Paolino which Plaintiffs find actionable.<sup>2</sup>

An appropriate order follows.

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<sup>2</sup> Plaintiffs' Second Amended Complaint, if filed, and like all papers filed with the Court, must be consistent with the strictures of Rule 11 of the Federal Rules of Civil Procedure, subject to sanctions if violated.